

## The legal position of the transsexual: mostly unsatisfactory outside Sweden

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Transsexualism cannot be dismissed as a hysterical whim. It is a deeprooted abnormality, has proved resistant to any treatment known to us and causes a great deal of suffering to the patient and to his family.<sup>1,2</sup> The fact that only a relatively small number of persons in most cultures suffer from it does not allow us to ignore it.<sup>3</sup>

The sheet anchor of the help we can give to transsexual patients is management rather than treatment. He does of course need a firm diagnostic assessment, and he wishes his body to be changed by medication and plastic surgery, but none of this is of any avail if he cannot be helped to obtain social and legal recognition in his chosen gender role.

Gender identity as such has in the past not received much attention from anyone. It was taken for granted; no questions were asked. Medicine became aware of it through its abnormalities. When we learn that some people have an abnormal gender identity and seem to adhere to it despite mountainous difficulties, we ask not only how such an abnormality can come about, but even more agonizingly how "normal" gender identity comes about. Such questions have found us ill prepared. We physicians were quite ignorant and had to start from the beginning.<sup>4,5,6,7</sup>

Something similar has happened in the legal profession.<sup>8,9,10,11,12,13,14,15,16</sup> Faced with persons who, although their bodies seem in no way abnormal, vigorously protest that they are cast into the wrong gender and want to be socially established in what they consider to be their right gender, the legal experts reach for the books to find what the law means by a "man" or a "woman". But the law does not provide any definitions of sex. Although gender

pervades many parts of our legal code most profoundly, it has never been made explicit but has all along been taken for granted.

Nothing is more inflexible than what has never been defined but has been taken for granted. With definitions one can argue, with assumptions one cannot. No one knows that better — or has learned this more painfully — than the transsexual.

### The law

In society and the law, people are either male or female, and the decisive characteristic is the entry on the birth certificate.<sup>12,13,17</sup> Medicine too has never defined sex, but it has considered a number of relevant factors as determinants of sex.<sup>5</sup> These include chromosomal sex, gonads and internal genitalia, external genitalia, hormonal patterns, secondary sex characteristics, erotic orientation and gender identity. The transsexual is a person who believes firmly that he or she is of the opposite sex to that indicated by all the contrary organic evidence.<sup>18</sup> His erotic orientation is usually but not always in line with his gender identity.<sup>16,19,20</sup> As transsexuals begin to demand recognition and acceptance in society, the courts will be faced with the task of rendering a definition of sex, and this will only be achieved sensibly if done in cooperation with the medical profession.

A brief survey of such attempts will be given here, many in this writer's opinion less than satisfactory, and one — in Sweden — which seems to go a long way toward providing what is needed.

### Legal aspects

The surgical procedures are not an aim in themselves; they are worthless if the patient cannot then live in the chosen gender role, and to achieve

that he has to take certain legal steps.<sup>12</sup> The transsexual needs a good lawyer at least as much as he needs a good physician.

### Name change

He or she will want to change the given name, and this is very often done before surgery.<sup>21,22</sup> The procedures by which this can be done vary from country to country.<sup>17,23</sup> In Canada, the US or the UK, it is not necessary to apply for a "legal" change of name; it is acceptable simply to assume a new name as long as it is not done for a fraudulent purpose.<sup>21,23</sup> It may nevertheless be advisable for the patient formally to apply to the courts, as this will subsequently make it easier to obtain changes on other documents. In some jurisdictions, the application has to be published in a newspaper thus giving the case unwelcome publicity. However, often the court may dispense with this requirement where evidence shows avoidance of publication is desirable.<sup>12</sup> In many countries a common-law change of name is not possible and a legal application with medical support is necessary. However, cases where such applications have been turned down cannot be very common; I know of none.

### Other documents

After a change of name there will be a host of documents which have still the old name or a wrong photograph on them. There are the passport, social insurance card and driver's licence; school records and degrees or diplomas will have to be changed, as well as professional licences and citizenship papers. Each change will have to be negotiated with officials, and the advantage of a legal name change rather than a common law one will be at once apparent. The patient's road

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will be strewn with many stones but the difficulties will not usually be totally unsurmountable anywhere in the world as far as we know. For instance, in the US 40 states have issued drivers' licences with change of name and gender.<sup>24</sup> In the UK many patients have obtained new national insurance cards with name and sex changed even before undergoing sex reassignment surgery.<sup>21,20</sup>

### Birth certificates

The change of the birth certificate, in particular the change of designation of sex, is usually extremely difficult if indeed it is possible at all.<sup>12,13</sup> The importance of that change for the transsexual cannot be overrated. The birth certificate is a basic document of general identification, which may have to be produced when seeking employment, purchasing insurance or obtaining travel documents, as proof of age and in many other situations.

In most countries, a change in the birth certificate can be made only if it can be shown that a mistake had been made at the time of the original issue of the certificate. For instance, Ontario's Vital Statistics Act in section 30(2) states:

If, while the registration of any birth, death or stillbirth is in the possession of a division registrar, it is reported to him that an error has been made in the registration, he shall inquire into the facts and if he is satisfied that an error has been made in the registration, he may correct the error according to the facts by a notation on the registration without any alteration being made in the registration.<sup>25</sup>

In other jurisdictions — many states in the US and Britain — similar legislation exists. Yet it is nowhere clearly set out how the sex of the newborn is to be determined. It is usually left to the doctor or the midwife to determine the sex.<sup>9</sup> The resistance to changes is astonishing. In the US in the case of Anonymous vs. Weiner a male-to-female transsexual after surgery applied to the New York City department of health's bureau of records and statistics for a suitable change on "her" birth certificate.<sup>26</sup> The department turned for advice to the NY Academy of Medicine, which in turn sought the opinion of a panel of medical and legal experts. The panel opposed the change on the following grounds:

- Male to female transsexuals are still chromosomally males.
- It is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation.

Holloway, criticizing this ruling on

the grounds that sex is not always determined by chromosomes, asks further why the transsexual should not be helped in this way. He points out that no conceivable harm could come to anyone as a result of such a change.<sup>27</sup>

Recently the New Jersey bureau of vital statistics made a decision to issue a birth certificate in a client's new name with the original sex designation crossed off and the new one added.<sup>24</sup> In the US, 15 states do now permit postoperative changes in the birth records. In the UK a number of patients have obtained a similarly changed certificate. Such a document is of course less than satisfactory for the transsexual, but will help to a certain extent. It does however show the social limbo in which the transsexual is forced to exist.

In Switzerland, legislation has been more enlightened.<sup>28</sup> As early as 1945 a Swiss court concluded that gender identity was the proper criterion for determining sex in an operated transsexual, and in 1963 a successful case was reported by Glaus.<sup>29</sup>

In British Columbia and Alberta, recent amendments to vital statistics acts permit a change in the sex designation after sex reassignment surgery. The conditions are that the applicant is unmarried at the time of the application and that a number of medical certificates are submitted.

Every birth certificate issued after the registration of birth is changed under this section shall be issued as if the original registration had been made showing the sex designation as changed under this section.<sup>30</sup>

In the Alberta act, marriage certificates are also included.<sup>31</sup>

### Marital considerations

Many transsexuals wish to marry, and some succeed in doing so. Whether such a marriage is legally valid or not is rather questionable. The issue is overshadowed by the decision by the English High Court of Justice, when in the case of Corbett vs. Corbett (otherwise Ashley), Mr. Justice Ormerod held that a marriage between a male-to-female transsexual and a man was void.

Marriage being essentially a relationship between man and woman, the validity of the marriage depended on whether the respondent was or was not a woman and, the respondent being a biological male from birth, the so-called marriage was void.<sup>32</sup>

The trial had lasted 18 days, an unusually large number of medical experts had testified and the case was extensively argued. Judge Ormerod gave at some length his reasons for the decision, and they boil down es-

entially to his definition of sex. He holds that sex is determined by chromosomes, the gonads and the genitalia. Particularly if those three are concordant, the sex of the patient is thereby determined. Gender identity per se — that is, the subjective sense of gender — is not held to be a criterion. The transsexual is left out in the cold.

The case was heard in 1970, and the issue was raised again in the House of Commons in 1971 when the Nullity of Marriage Bill was before the House.<sup>33</sup> In spite of strong representations to amend the bill to take into account the plight of the transsexual, it received its third reading, upholding the judgement in the case *Corbett vs. Corbett*. No further cases have to my knowledge come to court since then until March 1976, when the New Jersey appellate division of superior court unanimously declared that an individual who changes sex through surgery is entitled to all the legal rights enjoyed by others of the same sex, including marriage. A marriage of a transsexual, it was ruled, is valid as long as the transsexual tells the partner in advance about the sex change operation. The court rejected previous court rulings in the US and England, including that in *Corbett vs. Corbett*. As the New Jersey supreme court has denied a request for further appeal the judgement stands, and it is a strong legal factor, particularly because Judge Alan B. Handler has set out his opinion very clearly in an 18-page document.<sup>34</sup> Again the situation shows the profound uncertainties besetting the lives of transsexuals whose position can repeatedly be tested and retested in the courts, questioning anew any ground help up to then to have been secure.

#### Criminal law

A number of provisions of the Criminal Code can affect the transsexual in an unusual way. Although in biblical law (Deuteronomy 22:5), "No woman shall wear an article of man's clothing, nor shall a man put on woman's dress, for those who do these things are abominable to the Lord, your God," in most countries cross-dressing per se is not persecuted. However, charges are often laid for causing a disturbance, for loitering with intent or for similar reasons. The transsexual can find himself in trouble because it constitutes a crime to form the intention of committing an indictable offence while being disguised. The transsexual, in order to forestall difficulties with the police, often carries on him a letter from his or her doctor giving an explanation of his condition. A transsexual can be charged under certain circumstances for buggery or gross indecency for acts which to "her" are but normal sexual



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activities not normally chargeable when carried out by a man and a woman.<sup>12,13</sup>

Lawyers have also questioned what might happen if a man is charged with rape for sexually assaulting a male-to-female transsexual, or if a female-to-male transsexual attacks a woman. Such questions it appears have so far not been tested in court.<sup>9,12</sup>

#### Testamentary problems

If a gift is bequeathed by the testator to "his eldest son" who has since then undergone sex reassignment surgery, will "she" still get the gift? No such cases have been tested but the question has arisen in relation to the succession to a title. When Lord Sempill, the 19th baron of that line, died in 1965 the succession to the old titles arose.<sup>34</sup> Sempill was a pioneer in aviation, a record-breaking pilot, and he had devoted most of his life to the conquest of the air. He had held many distinguished positions at home and abroad in war and peace. He also held two of the oldest titles in Scotland, a barony dating back to 1489 and a Scottish baronetcy going back to 1650. Under Scots law his eldest daughter succeeds to the barony; the succession to the baronetcy however was claimed

by the Hon. Ewan Forbes-Sempill. He was born in 1912 the Hon. Elisabeth Forbes-Sempill as Lord Sempill's sister. She was a doctor and had lived as a woman for 40 years when in 1952 she announced that she had become a man and had reregistered her birth as that of the second son, instead of second daughter, of the 18th Baron Sempill. She had also changed her name to Ewan. The Scottish court of sessions ruled that Sir Ewan was the male heir but a cousin, John Forbes-Sempill claimed *he* was next in the male succession. After a 3-year dispute over the succession to the title, the home secretary of the day, James Callaghan, finally decided in favour of Sir Ewan, who became the 11th baronet of Craigievar. Sir Ewan Forbes's legal representative issued the following statement:

I think it important to realize that Sir Ewan's case has always been that he has been male since birth, and that he was originally wrongly registered as female. As he was their heir male, he succeeded to the baronetcy on the death of his brother...<sup>35</sup>

The case has a number of interesting facets. We do not know what the cause was of the wrong registration at birth, an error which had persisted for 40 years before it was set right. Whether the cause was one or another form of hermaphroditism, or whether it was transsexualism, we do not know. The effect of the error on the life of the victim would have been the same, yet the law would treat the two cases very differently. This surely highlights the arbitrariness of the attitude of the law in how it determines the legal gender status of a person.

Lastly the testamentary capacity of a transsexual could conceivably be questioned as not having been of sound mind, and his or her will could be contested. Again this is so far only hypothetical.

#### Swedish law

From the foregoing it is obvious that transsexuals who have undergone surgery are largely left to live in a legal limbo. As L. Abse, the British MP, stated:

...we would be unjust and unfair if we persisted in continuing to believe that nature is not often shamelessly untidy. We have in our community a small group of people on whom nature has played a tragic trick... We would indeed be an insensitive Parliament if we allowed the passing of this bill without amendment, for that would push these people yet further into a bewildering limbo.<sup>33</sup>

The essential difficulties for transsexuals are:

- Their legal status can at all times and in all respects be questioned in court.

- To regularize their social and legal status they cannot settle the matter in one action taken after due enquiry, but have to fight many battles; consequently

- Their social and legal status is that of one sex in some respects, and of the opposite sex in other respects, clearly a confusing and thoroughly unsatisfactory situation.

Recent legislation in Sweden goes a long way to overcome these difficulties and should interest transsexuals and those who have their welfare at heart. The law is briefly described by Wälinder et al.<sup>23</sup> The law came into force in 1972, and up to 1974, 62 transsexuals — 33 men and 29 women — have been dealt with under its provision. Under the law, the responsibility for the decision to grant sex reassignment to an applicant rests with a national board, which in turn has appointed a special committee possessing expert medical and legal knowledge to deal with such questions. Before the decision is taken, the case is referred to three expert councils, one representing psychiatry, one endocrinology and one jurisprudence. These committees also deal with the question of sterilization and castration. If the application by the patient is approved, the national board instructs the parish office to change the entry in the parish register and to authorize other offices to make appropriate changes in various documents.

The change of name is dealt with by another authority, the national registration office, which refers cases of transsexuals to the national board; the change of name is usually effected long before surgery is undertaken.

The law sets out certain conditions for sex reassignment. The applicant must have been found to present the syndrome of transsexualism. He must also be incapable of reproduction. He must be at least 18 years old, a Swedish citizen and unmarried at the time of applying. The application must be supported by medical reports. Before he or she can apply for sterilization or castration, there must have been a trial period of at least 1 year after the change of name during which time the patient has lived in his new gender role and remained under observation. Operations on the sex organs are not made a condition for granting authority for change of gender, although it would be unusual for a transsexual not to ask for it; indeed in such an event it would be questionable whether one is dealing with a case of transsexualism. The new gender role, once assigned, becomes incontestable in court and

applies to all aspects of the person's life. It is also irreversible.

## Conclusions

In most countries the legal provisions to enable transsexual citizens to make reasonable social adjustments in their new gender roles are unsatisfactory. The law in Sweden appears for the first time anywhere in the world to take into account what is known to medical science about this extraordinary condition of transsexualism, and it is inspired by humanity and tolerance to make the life of the minority of transsexuals in our midst more tolerable and society more just toward them.

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Hematological changes, occurring particularly in the elderly, are mostly transient and reversible (primarily, neutropenia and thrombocytopenia; less frequently, leukopenia, aplastic or hemolytic anemia, agranulocytosis, and bone marrow depression).

### Precautions

As with other sulfonamide preparations, benefit should be critically appraised against risk in patients with liver damage, renal damage, urinary obstruction, blood dyscrasias, allergies, or bronchial asthma.

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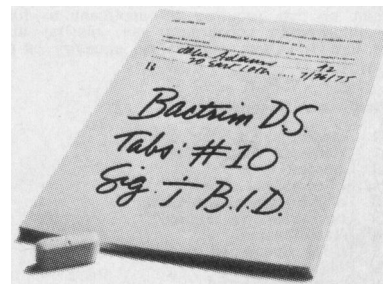
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